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Lowell D. Perry v. Earl E. Woodall : Respondent's Brief On Appeal

IN THE SUPREME COURT
of the
STATE OF UTAH

LOWELL D. PERRY,
Plaintiff-Appellant
vs.
EARL E. WOODALL,
Defendant-Respondent.

Case No.
11014

RESPONDENT'S BRIEF ON APPEAL

Appeal from a Judgment of the
Second District Court of Davis County

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AUTHORITIES CITED

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STATEMENT OF FACTS

Appellant's statement of facts recites those facts favorable to appellant instead of stating them favorably in support of the lower court's decision. This court recently said:

> "This being a case in equity, it is our responsibility to review the evidence. In doing so it is well to have in mind the general pattern as to the scope of such review as set out in prior adjudications in this court. Where there is a conflict in the evidence, the finding of the trial court will not be disturbed if the evidence preponderates in favor of the finding; nor, if the evidence thereon is evenly balanced or it is doubtful where the preponderance lies; nor, even if its weight is slightly against the finding of the trial court, but it will be overturned and another finding made only if the evidence clearly preponderates against his finding." *Nokes* vs*Continental Mining & Milling Co. et al,* 6 Utah 2d 177, 308 P. 2d 954.

We think the facts can be fairly summarized by following the format of the lower court's findings of fact, and showing how they are supported by the evidence.

Perry was president of Buy Wise Drugs Inc. (Tr. 30). He experienced great difficulty in the management of the business (Tr. 75). The assets for a considerable period of time had been insufficient to cover the liabilities of the corporation (Tr. 74). Because of this, Perry was discouraged and wanted to salvage what he could (Tr. 37).

Woodall was a pharmacist who had been working at the store (Tr. 36) and Perry became convinced in his own mind that he could solve his own problems if he could sell the corporate stock in the company to Woodall (Tr. 6, 37).

Woodall was then, in general, aware that the store was having some financial difficulties but he had held himself aloof from the financial end of the business and did not appreciate the extent of the financial problems (Tr. 55, 124).

Perry, prior to March 14, 1964, represented to Woodall that by an investment of $6,500 all seriously pressing financial problems of the store would be resolved (Tr. 38, 39). Perry did not inform Woodall that he had either delivered, or caused to be in the process of delivery, certain checks in an amount greatly in excess of $6,500 to pay some of the accounts payable (Tr. 38). Woodall knew that there were approximately $5,000 of

outstanding checks (Tr. 41) but in fact there were checks in excess of $20,000 then written (Tr. 38, 64, 70). Perry was being hounded by creditors (Tr. 70). Because there were no funds to cover these checks when they were later presented, fourteen of them bounced (Tr. 70, 71, 108, Ex. 7). The books of the corporation showed the accounts on which checks had been drawn as having been paid even though the checks had not been delivered nor cashed (Tr. 105).

Perry represented that the business was being operated at a profit (Tr. 38, 60, 84, Ex. 6) with a resultant surplus in excess of $12,000 (Ex. L). In fact, the business had lost money during the first part of 1964 and each of the two previous years (Tr. 84). Instead of a surplus there was a deficit (Tr. 83, 84, 90, 120, 134).

The total indebtedness was represented to be less than $47,000 (Ex. L) whereas, in fact, it was in excess of $61,000 (Tr. 39, Ex. D).

Woodall, because of his close association with Perry, accepted said representations without any serious endeavor to find out exactly what the financial condition was, except for a general review of an inventory that had been taken and examining the balance sheets in evidence (Tr. 45, 46). Woodall did not appreciate the full extent of the indebtedness of the corporation until July of 1964 (Tr. 38). Woodall in July of 1964 indicated to Perry a desire to rescind the agreement and attempt to renegotiate (Tr. 39) to purchase assets instead of corporate stock (Ex. C). This indication was prior to

the corporation's being forced into receivership. Receivership proceedings were begun in August of 1964 (Tr. 21) on the petition of one of the major creditors (Tr. 74). In order to acquire all the assets of the corporation, which he expected to acquire indirectly through purchase of all of the stock of the corporation from Perry for $50,000, Woodall bid $45,000 and purchased them from the receiver (Tr. 40). He is presently paying that amount to the receiver (Tr. 40) for the assets as they were at the time of the receivership sale. There were then more assets than at the time of the misrepresentation (Tr. 76).

Woodall does not have the certificates of stock in Buy Wise Drug. They were in his possession for inspection at one time but were returned by him (Tr. 20, 28, 33). Pursuant to the execution of the agreement to buy the stock, the following was either received by Perry or by others for Perry's benefit:

(a) The sum of $1,810 (Tr. 9, 65).

(b) Merchandise of a value of $1,700 (Tr. 26). Although Perry claims that the value of the merchandise was offset by the value of theater tickets given by him to Woodall; no such tickets were given (Tr. 59).

(c) $800 received by the L.D.S. Church for Perry's personal tithe (Tr. 66).

(d) $255.26 received by Maurice Anderson for Perry's personal clothing (Tr. 14, Ex. 3).

(e) $118.00 for Perry's personal automobile insurance (Tr. 11, Ex. 3).

(f) $152.50 received by Perry's attorney for personal legal services (Tr. 11).

ARGUMENT

POINT I.

VARIOUS INFERENCES ARE UNFOUNDED.

Certain statements of facts and inferences in Perry's brief are worthy of comment. The references are to the page on which they are found in Perry's brief:

p. 2. It is stated that failure of Woodall to invest $6,500 in the business or make payments required by the contract resulted in the receivership. $6,500 is an insignificant part of the $61,000 total indebtedness. In fact $4,000 to $5,000 was invested in the business to pay on both old and new accounts (Tr. 43, 45).

p. 2. It is stated that Woodall agreed to buy the assets of the corporation at the receivership sale by paying "$45,000 at which time the total liabilities and net worth were $86,000, leaving net assets of $41,000 over liabilities." The implication seems to be that a $41,000 profit was made by this purchase in receivership. This is fallacious. Liabilities plus net worth minus purchase price do not equal net assets over liabilities. More importantly, whether or not Woodall made an advantageous buy at a receivership sale conducted by a court and open to public bidding is wholly irrelevent. Looking at it from Woodall's point of view, he was buying a dead horse, and if his obligation to pay the $50,000 to Perry for the stock in the corporation were not rescinded, he would be paying twice. Furthermore, the assets would have substantially

changed between the time he agreed to buy the stock and the time the receivership sale was eventually held.

p. 2, 5, 29.. It is stated that the evidence shows later profitable operation. It is completely irrelevant what profit or loss resulted to a new corporation using as part of its assets, assets purchased in the receivership. That would be due to various factors such as amount of capital, skill of management, long hours spent by Woodall as manager, reduction in number of employees (Tr. 122, 138).

p. 12. It is stated that Woodall's then attorney made no objection to the fact that indebtedness exceeded $6,500. At the time the letter was written, Perry as well as Woodall was renegotiating to make a new deal. The letter itself states that the offer is made on the assumption that the previous agreement is void. There was no reason to review all past differences in a letter wherein an offer is being made to arrive at a new bargain. The tone of the letter assumes that both parties recognize that the old transaction for the purchase of corporate stock was no longer binding and they are now attempting to make a new agreement whereby assets would be purchased.

p. 13. It is stated that Woodall's accountant knew of the financial difficulties and it is implied that that knowledge is imputable to Woodall. The accountant was not employed by Woodall until August of 1964, so his knowledge would be of no significance (Tr. 82).

p. 13, 25. It is stated that Woodall changed his testimony as to the representation about $6,500. His testimony before the introduction of Exhibit L related to pressing current accounts. He testified that Perry said, "You invest $6,500 into this business, and he said, you will pretty well clear up the current accounts payable. He said it is fun to operate a business this way when you can just operate and go from month to month" (Tr. 38). There was no vacillation.

p. 17. It is stated that the outstanding checks were all paid before July 3rd and that they were paid from store receipts without any investment or payment by Woodall. Woodall stated he had put four to five thousand dollars in the business (Tr. 43). It is implied that the operation was tremendously profitable. It ignores the fact that this was just a clearing off of the oldest indebtedness and that current operations would have been creating new indebtedness. It also ignores the fact that other old indebtedness resulted in receivership.

p. 20. It is stated that there was a representation that a profit had been made during the first part of 1964 (Tr. 38). It is then stated that Woodall, in his operation for the entire year, made a profit, implying that that made the representation true. This is a non-sequitur. In fact there had been a loss during the first part of the year as well as a loss during each of the two previous years (Tr. 84).

POINT II.

THE EVIDENCE SUPPORTS THE FINDINGS AND THE FINDINGS SUPPORT THE JUDGMENT.

The findings are reflected almost verbatim in the above statement of facts and each one is supported by the evidence found at the pages of the record as cited.

p. 26. Perry argues that some of the findings determine that some misrepresentations were made which were not expressly delineated in the pleadings. No objection was raised at the trial to the evidence relating to the misrepresentations. No motion to strike evidence was made. Although a motion for a new trial was made, one of the possible bases for such motion under Rule 59(a)(3), surprise, was not a basis of such motion (Tr. 30). An opportunity was given to Perry to show what additional new evidence would be presented if a new trial were granted and nothing was presented (Tr. 39). Rule 15(b) provides:

> "(b) AMENDMENTS TO CONFORM TO THE EVIDENCE.—When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. . . ."

Even under former law an objection that there is a variance between pleading and proof cannot be taken for the

first time on appeal. *McCall Company vs. Jennings,* 26 Utah 459, 464, 73 P. 639. In *Draper vs. J.B.&R.E. Walker, Inc.,* 121 Utah 567, 244 P. 2d 360 this court said."

> "We believe that by permitting evidence to be received concerning the rights-of-way that it cannot be heard to complain that the issues do not permit a finding that the plaintiffs had rights-of-way and that they were blockaded by the defendant. We think Rule 15(b) of the Utah Rules of Civil Procedure set forth above automatically takes care of that contention."

p. 27. Perry asserts that a representation that, by an investment of $6,500, all seriously pressing financial problems would be resolved, is not a representation of fact, but is only opinion. We contend that this is a representation of fact as to the status of accounts payable.

In Harper and James, The Law of Torts, Vol. 1, p. 560, this definition of "fact" is given:

> "The courts will ordinarily classify a statement as fact if it relates to an event or state of affairs which either exists at the present moment or has had a past existence and if that event or state of affairs is susceptible of knowledge."

Perry contends that it was not shown that this particular representation was false because a receivership might not have resulted had Woodall paid the purchase price instead of rescinding. He argues that, because more money *might* have placated creditors, the fact that they were not offered money precludes a determination as to whether or not they constituted a financial problem. Actual accomplishment is not the only method of establishing a proposition.

The court concluded, in its memorandum decision, that the representation was false, stating that Perry, unknown to Woodall "had either delivered or caused to be in the process of delivery a number of checks in excess of the sum of $9,000.00 to pay accounts payable. The defendant did not know the magnitude of these checks and would not have bought the store had he known the extent of the immediately pending debt" (Tr. 32). The court's findings are to the same effect: "Plaintiff did not inform defendant that he had either delivered or caused to be in the process of delivery certain checks in an amount greatly in excess of $6,500 to pay some of the accounts payable, for which there were no funds to cover" (Tr. 25). But, more importantly, the representation did not relate to what creditors would do in the future, but rather, the extent of the then existing obligations owed those creditors then seeking payment.

p. 27. Perry argues that payments by Woodall would have helped to solve Perry's financial problems and cites Perry's opinion to that effect (Tr. 71). The court need not believe Perry's testimony. Whether or not payments would have helped solve problems is not relevant to the question as to the truth of a representation regarding whether or not problems existed and the extent thereof.

p. 28. Perry argues that inasmuch as the profit and loss statement included salaries, the statement showing a loss is not proof that the corporation was not making a profit. It would be a peculiar financial statement which did not include salaries. Furthermore, the highest salary

was less than $12,000, which hardly reflects an excessive expense.

p. 28. Perry argues that the representation that there was a surplus in excess of $12,000, whereas in fact, there was a deficit, was an afterthought. The deficit was incident to a lack of profit, which was expressly made an issue by the pretrial order (Tr. 19).

p. 28. Perry argues that because the misrepresentation regarding surplus was not a part of the memorandum decision, that it was not an inducement. A memorandum decision is not intended to cover all points. If it were, there would be no need to have findings. Furthermore, whether or not the judge had something in mind is no criterion as to whether or not Woodall was relying on the representation.

p. 28. Perry argues that a surplus depends on how the accountant handles values. For the purpose of argument, conceding that to be so, the court determined from the evidence that, on a proper accounting basis, there was a deficit (Tr. 25). Perry's own balance sheets showed deficits (Tr. 84, 85, Ex. 1). Perry argues that good will should be considered, and implies that if a figure were assumed for an asset of good will, that then there would have been a surplus. It is doubtful that a corporation about to go in receivership has a good will of any value. There is no evidence thereon whatsoever. Furthermore, since none of Perry's financial statements included good will, it is apparent it was not considered to be an asset.

p. 29. Perry argues that subsequent profits proved the worth of the business. As pointed out above, there are many unmeasured variables, other than the value of assets acquired by purchase at the receivership sale, which would affect subsequent net profits of the new corporation formed by Woodall.

POINT III.

THE NINE ESSENTIAL ELEMENTS OF FRAUD ARE PRESENT.

The above statement of facts shows that the court expressly found on each of the nine elements of fraud required by this court in *Pace* vs *Parish,* 122 Utah 141, 247 P. 2d 273, and the citations to the record show how each finding is supported. Under the accepted rules of review as set forth in *Nokes* vs *Continental Mining & Milling,* supra, this court should not subsitute its findings for that of the lower court.

POINT IV.

WOODALL HAS NOT WAIVED ANY RIGHT TO RESCIND.

As set forth in the statement of facts above, the findings, amply supported by the evidence, are to the effect that Woodall became aware in July of the full extent of the misrepresentations, that in July he indicated to Perry a desire to rescind the agreement, and that he attempted to renegotiate (Tr. 39) to purchase assets instead of corporate stock (Ex C). Perry himself recognized that the prior agreement was no longer in effect when he stated in October that he was taking over the management of the store (Tr. 91). Furthermore, in his

dealings with the receiver, he contemplated that he would receive the excess of any bid over the amount of indebtedness, which indicated that Perry himself did not deem the contract of sale in force (Tr. 25). The corporation being subject to receivership proceedings in August, it is inconceivable that Woodall would have still wanted to pay $50,000 for its corporate stock, and that he did not adhere to his purpose to rescind the stock purchase contract, nor is there any evidence that he did not so adhere.

p. 29. Perry argues that by possession of the assets Woodall has waived his right to rescind. He is in possession of assets, not because he bought the corporate stock from Perry, but because the receiver would have had those assets if Woodall had not agreed to pay $45,000 for them (Tr. 40).

POINT V.

PERRY IS IN HIS FORMER STATUS QUO.

Perry argues that, because Woodall did not withdraw from the bidding at the receivership sale of the corporate assets, so that a Mr. Butterfield's bid would be the only bid, that Perry has not been able to recoup all of his anticipated gain from a sale to Butterfield, through which Perry would have been made whole and put in his former status quo. Such reasoning assumes in the first place that the receivership court rejected a bid $30,000 better than Woodall's. It is a novel argument that a seller would have obtained a better price with fewer bidders. Furthermore, it is stretching the concept of being placed in status quo to a ridiculous extent to argue

that Woodall's bidding or refraining from bidding at a later receivership sale of inventory and other assets has anything to do with restoring Perry to his former position as to corporate stock ownership.

p. 34. Perry implies that because, as of the end of 1965, Woodall acquired assets of a book value of roughly $86,000, for $45,000 by being the higher bidder at the receivership sale, that in order to be put in status quo, Perry should be paid part of the difference. Such an argument ignores the reality that Perry was the owner of the corporate stock of the corporation, which was in receivership. At the sale of the receivership assets to the highest bidder at public auction, the creditors of the corporation would first be paid and if there was a surplus that would be paid to the owner of the stock. If there was something amiss in the receivership sale, Perry's remedy was to show what was wrong, or to get someone to bid enough at the sale so that he could realize some value from his stock. Failing in that, the result is that Perry's stock, in fact, had no actual value. Whether Woodall made an advantageous or disadvantageous purchase at a later receivership sale of assets, is entirely irrelevant to the question as to whether or not Perry is in status quo. He has his stock, which was then and still is worthless.

POINT VI.

THE RESTITUTION WAS PROPER.

Perry himself conceded to the court that the bulk of the amount of $4,835.76, ordered paid Woodall by

Perry, constituted a proper claim. In testifying as to what credits should be allowed to Woodall, Perry conceded that he had received as payment on the contract $1,810, attorneys' fees for personal matters of $152.50, car insurance premium for his personal car $118.00 (Tr. 9, 10, 11).

The balance of the items are the following: (a) Merchandise of a value of $1,700. Perry argues that he thought these were paid for by an exchange of theatre tickets. Woodall testified he never did receive the tickets (Tr. 59), and the court believed Woodall, as shown by finding 13. (b) $800 personal tithe to the L.D.S. Church, (c) $255.26 payments to a clothing store for personal clothing (Tr. 14 and 66, Ex. 3). Perry personally received the benefit of these payments.

POINT VII.

THREE MISREPRESENTATIONS ARE NOT SUBSTANTIALLY DISPUTED.

Perry's brief sets forth various arguments as to why rescission should not be based upon the misrepresentation as to pressing accounts payable. There is almost no argument advanced as to why rescission based upon the other three misrepresentations, as to profit, surplus and total debt do not support a rescission.

CONCLUSION

Perry in his brief has ignored the fact that the lower court believed Woodall, and disbelieved Perry. He is asking this court to ignore the findings and conclusions of the lower court, which are amply supported

by the evidence, and reverse on the basis of his own testimony, which the lower court was entitled to disbelieve in its entirety because of Perry's bias. *Arnold Machinery Co.,* vs *Intrusion Prepakt Inc.,* 11 Utah 2d 246, 357 P. 2d 496. The findings are to the effect that there were four separate misrepresentations, each of which *alone* was material and supports a rescision relating to:

1. Pressing accounts payable.
2. Profit.
3. Surplus.
4. Total indebtedness.

The judgment should be affirmed.

Respectfully submitted,

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